No. 84-978

In The

Supreme Court of the United States

October Term, 1984

EXXON CORPORATION; THE B. F. GOODRICH COMPANY; UNION CARBIDE CORPORATION; MONSANTO COMPANY and TENNECO CHEMICALS, INC.,

Appellants,

v.

ROBERT HUNT, Administrator of the New Jersey Spill Compensation Fund; CLIFFORD GOLDMAN, Treasurer of the State of New Jersey; SIDNEY GLASER, Director of the Division of Taxation; JERRY F. ENGLISH, Commissioner of the Department of Environmental Protection; and THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (also known as "Superfund"), 42 *U.S.C.* § 9601 *et seq.*, preempts the taxing provisions of the New Jersey Spill Compensation and Control Act, *N.J.S.A.* 58:10-23.11 *et seq.*, which the New Jersey Legislature enacted in 1977 to finance the State's petroleum spill and hazardous waste site cleanup program?

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Appellees Robert Hunt, Administrator of the New Jersey Spill Compensation Fund, *et al.*, respectfully move pursuant to Rule 16(1)(b) and (d) to dismiss this appeal or affirm the judgment of the Supreme Court of New Jersey because the issues presented do not raise substantial federal questions meriting plenary review by this Court, and because this case was correctly decided below in keeping with well-established preemption doctrine and the precedents of this Court.

COUNTER-STATEMENT OF THE CASE

In 1977 the New Jersey Legislature adopted the Spill Compensation and Control Act ("Spill Act"), *N.J.S.A.* 58:10-23.11 *et seq.*, to protect the citizens and environment of the State from damage resulting from discharges of petroleum and other hazardous substances. To finance the spill prevention and cleanup program created by the Spill Act, the Legislature imposed a tax upon major petroleum and chemical facilities. *N.J.S.A.* 58:10-23.11h; *see also N.J.S.A.* 58:10-23.11b(1) for the definition of "major facility." The tax was levied on a per barrel basis for petroleum, and on either a per barrel or percentage of fair market value basis for hazardous substances. *N.J.S.A.* 58:10-23.11h. The Spill Act provides for the revenues generated by the tax to be credited to the Spill Compensation Fund ("Spill Fund") which is authorized to finance, among other things, spill response costs incurred by the Department of Environmental Protection; property damage and loss of earnings claims resulting from hazardous discharges; the personnel and equipment costs of the Department of Environmental Protection associated with the enforcement of the Spill Act; and the administrative costs of the Spill Fund. *N.J.S.A.* 58:10-23.11g; *N.J.S.A.* 58:10-23.11o. From 1977 through 1980, the Spill Fund provided the primary source of revenue for New Jersey's petroleum spill and hazardous waste cleanup program.

At the end of 1980, however, Congress recognized that states acting alone could not adequately address the staggering problems associated with the release of hazardous substances into the environment. Consequently, Congress adopted the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"), 42 *U.S.C.*

§ 9601 *et seq.*, to assist the states in financing cleanups at the most severely damaged and highest priority sites throughout the nation. Funding for this federal effort was provided by a 1.6 billion dollar trust fund to be raised over a five-year period by placing a tax on crude oil, petroleum, and certain chemicals, and by transferring to the Fund appropriations from general federal revenues. 26 *U.S.C.* § 4611 *et seq.*; 26 *U.S.C.* § 4661 *et seq.*; 42 *U.S.C.* § 9631. The tax was structured to provide 87.5% of the fund, while general revenues were to make up the balance.

Enacted as a compromise measure in the waning days of the 96th Congress, the Superfund Act as finally adopted drastically reduced the funding levels and coverage proposed in predecessor bills. Its direct precursors which formed the basis for the compromise were S. 1480, which provided $4.1 billion over six years for oil spill and hazardous substance release cleanups and third party damage claims including victim compensation; H.R. 85, which focused primarily on petroleum spill cleanups and also provided for the payment of claims resulting from property damage or economic loss; and H.R. 7020, which was directed at remedying abandoned hazardous waste dumpsites. Although the Superfund Act grew out of these earlier bills, it did not authorize compensation for third party damage claims, excluded petroleum spills from coverage altogether (42 *U.S.C.* § 9601(14)), and reduced the size of the fund from over $4 billion to $1.6 billion. 126 *Cong. Rec.* 30932 (1980) (remarks of Senator Randolph). The compromise thus eliminated approximately "75 percent" of what initially had been proposed. 126 *Cong. Rec.* 30935 (1980) (remarks of Senator Stafford).

In recognition of the reduced federal program brought about by the legislative compromise, and certainly in rec-

ognition of the enormous remedial capability that must be developed to address the nation's staggering hazardous substance pollution problem, Congress designed the Superfund Act to encourage a joint federal and state response to toxic contamination. The statutory scheme thus provided a cooperative federalism approach through which states were encouraged to work together with the federal government. The importance of state participation in implementing the Superfund law is evident throughout the Act. *See* 42 *U.S.C.* § 9604(c) which provided that the federal government must consult with an affected state before determining appropriate remedial action, and required states to guarantee as a prerequisite to receiving federal funds: (1) all future maintenance at sites where removal and remedial actions were undertaken; (2) the availability of a hazardous waste disposal facility for the off-site storage or treatment of hazardous substances; and (3) payment of 10% or more of the total costs of remedial operations. *See also* 42 *U.S.C.* § 9604(d)(i) and 42 *U.S.C.* § 9614(a). It is abundantly clear, therefore, that Congress envisioned active state financial, technical, and administrative support as an integral part of the nationwide effort to eradicate hazardous substance pollution from the United States.

State participation is essential for the program to work. It is well-recognized that the money provided in the Superfund Act to launch the Federal program falls far short of the amount needed to remedy the hazardous waste problem in this country. In S. Rep. No. 848, 96th Cong., 2d Sess. at 17, for example, it was noted in reference to the then-proposed six-year, $4.1 billion Superfund that such an allotment " . . . will permit government response

only to the most significant releases. At this level of funding, response will not be possible at a large number of releases posing imminent or substantial threats to public health or the environment." These comments are even more striking when viewed in light of the level of funding actually supplied by Superfund which, as noted earlier, provided for only about 30% of the amount of money once deemed minimally necessary. A similar conclusion as to the insufficiency of federal funding under the Act can be drawn from H.R. Rep. No. 96-1016, 96th Cong., 2d Sess., reprinted in [1980] U.S. Code Cong. & Ad. News 6119, 6123, which noted that in 1979 EPA estimated that it would cost between $13.1 and $22.1 billion to clean up all the known inactive and uncontrolled hazardous waste sites in the nation. Given this limited federal funding—limited to the extent that it fell far short of covering projected needs—the role of each individual state became critical to the achievement of the ameliorative goals of the Superfund Act.

Although Congress recognized the importance of the state role, it was concerned that states would levy taxes on the chemical and petroleum industries to finance state programs that merely duplicated federal efforts. Congress consequently included the following provision in § 114(c) of the Superfund Act:

> Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter. Nothing in this section shall preclude any State from using general revenues for such a fund, or from imposing a tax or fee upon any person or upon any substance in order to

> finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which affects such State. [42 *U.S.C.* § 9614(c)]

Before enactment of the above provision, Senator Bill Bradley of New Jersey became concerned about its impact on the continued operation of the State's hazardous waste cleanup program. In the course of debate on the Superfund measure, he questioned Senator Jennings Randolph of West Virginia, a sponsor of the Superfund effort and Chairman of the Committee on Environment and Public Works which had reported the bill to the Senate, as to the future of state taxes on industry to fund hazardous waste cleanup programs if the foregoing provision were adopted. Included in the colloquy between the two senators were the following remarks:

MR. RANDOLPH. * * * What this bill does is prohibit a State from requiring any person to contribute to any fund if the purpose of that fund is to compensate for a claim paid for under the provisions of this bill.

* * *

Putting it simply, this is a prohibition against double taxation for the same purposes. It is not a prohibition on the uses that a State may make of its money, nor does it prohibit a State from imposing fees or taxes for other purposes connected with cleanup or restoration activities such as the purchase of pollution abatement equipment or the hiring or training of personnel for pollution prevention programs.

In summary, Mr. President, this preemption provision is narrow in scope and limited to the particular purpose of preventing double taxation.

MR. BRADLEY. Am I correct in assuming that moneys expended by State funds can be used to provide the required 10 percent State match?

MR. RANDOLPH. That is correct.

MR. BRADLEY. Am I also correct in noting that State funds are preempted only for efforts which are in fact paid for by the Federal fund and that there would be no preemption for efforts which are eligible for Federal funds but for which there is no reimbursement?

MR. RANDOLPH. That is correct.

MR. BRADLEY. Finally, if the Federal Government determines that the needs at other sites require that Federal efforts be terminated at the first site before that site is completed, may a State fund complete the effort?

MR. RANDOLPH. This legislation would permit that to happen. [126 Cong. Rec. 30949 (1980)].

Given the narrow scope of the language used in § 114(c) and the guidance of the foregoing colloquy, once the Superfund Act was adopted New Jersey began to administer the Spill Act to supplement rather than to duplicate federal cleanup efforts. The State had the flexibility to adapt its program in this way because the New Jersey Legislature had vested broad discretion in the Department of Environmental Protection to select the type and extent of cleanup and related activities to be financed by the Spill Act tax. *N.J.S.A.* 58:10-23.11f. In the post-Superfund era, therefore, New Jersey has sought to maximize the infusion of federal dollars into the State for cleanup activities. As a consequence, 85 New Jersey sites have been nominated to the priority list of approximately 535 sites maintained by the United States Environmental Protection Agency ("EPA") pursuant to 42 *U.S.C.* § 9605, and used

as a prerequisite to establishing eligibility for Superfund-financed remedial activity. 40 *C.F.R.* § 300.68; *see also* Appendix B to 40 *C.F.R.* Part 300.

Following the adoption of the Superfund Act, however, New Jersey's right to continue the collection of the Spill Fund tax was challenged by the Exxon Corporation and four other owners of "major facilities" responsible for paying the tax (referred to collectively as "Exxon") on the sole ground that *N.J.S.A.* 58:10-23.11h was preempted by the language contained in § 114(c) of the Superfund Act, codified at 42 *U.S.C.* § 9614(c). Following an unsuccessful attempt to raise this challenge in federal court (*see Exxon Corp. v. Hunt,* 683 *F.*2d 69 (3d Cir. 1982), *cert.* denied 439 *U.S.* 1104 (1983)), Exxon pursued the matter through the New Jersey court system. Upon reviewing cross motions for summary judgment on the merits, the Tax Court of New Jersey upheld the validity of the Spill Fund tax. *Exxon Corp. v. Hunt,* 4 *N.J. Tax* 294 (1982) (reprinted in the appendix attached to Appellant Exxon's Jurisdictional Statement ("Aa") at Aa47 to Aa78). This determination was subsequently affirmed by both the Appellate Division of the Superior Court, *Exxon Corp. v. Hunt,* 190 *N.J. Super.* 131, 462 *A.*2d 1983 (App. Div. 1983) (reprinted at Aa37 to Aa46), and by the Supreme Court of New Jersey, *Exxon Corp. v. Hunt,* 97 *N.J.* 526, 481 *A.*2d 271 (1984) (reprinted at Aa15 to Aa36).

In upholding the Spill Fund tax against Exxon's challenge, the Supreme Court of New Jersey followed the traditional approach established by this Court in preemption cases which requires ascertaining the meaning of the

federal and state enactments in question, and then determining whether they are in conflict. *Exxon v. Hunt, supra,* 97 *N.J.* at 533 (Aa23), citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.,* 450 *U.S.* 311, 317 (1981); *Perez v. Campbell,* 402 *U.S.* 637, 644 (1971); and *Florida Lime & Avocado Growers v. Paul,* 373 *U.S.* 132, 142 (1963). Pursuant to this well-established approach, the court below carefully examined the language of § 114(c), legislative history directly pertinent to that provision, and the purpose and spirit of the Superfund Act as a whole. This painstaking analysis persuaded the court that § 114(c) did not preempt New Jersey's right to tax industry to support Spill Fund activities, as long as the State tax was used to supplement and not to duplicate federal cleanup efforts.

While the Supreme Court of New Jersey did consider the plain meaning argument advanced by Exxon, it rejected the argument because the language of § 114(c) was not sufficiently clear on its face to support the extremely broad preemption interpretation urged by Exxon. The court consequently looked to contemporaneous legislative history concerning the preemption provision, and found ample support there for a much narrower construction of § 114(c)—a construction that would allow the New Jersey and federal taxes to coexist. *See* the Bradley/Randolph colloquy quoted above and cited in *Exxon v. Hunt, supra,* 97 *N.J.* at 538-540 (Aa28 to Aa30). Recent legislative history confirming this interpretation was also cited by the court below (Aa31 to Aa32), as was an agency construction to the same effect issued by EPA in a guidance docu-

ment provided to the states as part of Superfund program implementation (Aa32 to Aa33). This cumulative and compelling support for a narrow interpretation of § 114(c) convinced the court that Congress had not intended to vitiate New Jersey's hazardous waste cleanup program by cutting off its source of financing.

Also found persuasive by the court below, however, was the federal statutory scheme itself which focused on priority sites to the exclusion of other problem areas. *See* 42 *U.S.C.* § 9605; 40 *C.F.R.* § 300.68. In light of this limited federal coverage, the Supreme Court of New Jersey echoed the conclusion of the Tax Court which had found that "[i]t simply strains credulity to say that hazardous waste sites and spills not meeting the [priority list] criteria are claims which 'may be compensated' under [Superfund]." 97 *N.J.* at 543 (Aa34). Based on this realistic analysis of Superfund coverage, the court below rejected Exxon's broad preemption claim and endorsed "The more logical conclusion . . . that Congress contemplated that the federal government would attempt to deal with the problems of the most seriously affected sites . . . and to allow states to maintain a compensation fund . . . to conduct their own cleanup efforts on those sites not receiving Superfund compensation and to provide for their cooperative program components including their 10% share of cleanup costs, related administrative costs for equipment and personnel, and other program features not covered by Superfund. . . ." 97 *N.J.* 543-544 (Aa35).*

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* Since the adoption of the Superfund Act, New Jersey has administered its Spill Fund in a manner consistent with the ruling of the Supreme Court of New Jersey. Thus, the proceeds

(Continued on next page)

Dissatisfied with this result, Exxon filed a Notice of Appeal from the judgment of the Supreme Court of New Jersey on November 19, 1984. Exxon's Jurisdictional Statement was submitted thereafter. Appellees Hunt and the State of New Jersey, *et al.* urge this Court to dismiss the appeal for want of a substantial federal question meriting plenary review, or to affirm the judgment issued in this matter by the Supreme Court of New Jersey. In support of this motion, appellees rely upon this brief and the opinions rendered by the courts below.

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ARGUMENT

Plenary Review Of This Appeal Is Not Warranted Because The Supreme Court Of New Jersey Correctly And Convincingly Rejected The Preemption Argument Raised By Exxon After Applying Well-Established Principles Of Statutory Construction And Preemption Analysis To The Particular Circumstances Of This Case.

This appeal should be dismissed, or the opinion below affirmed, because the Supreme Court of New Jersey carefully followed the methods established by this Court for

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of the Spill Fund have accordingly been used to finance the State's 10% or greater share of remedial costs at priority sites selected for cleanup work by EPA, to finance site cleanups where no federal funding has been made available, to finance personnel and equipment costs incurred by the Department of Environmental Protection in enforcing the Spill Act, and to finance the administrative expenses of the Spill Fund. To the extent that appellants assert otherwise (Jurisdictional Statement at p. 4), they are plainly wrong; in any event, there is nothing in the record of this case to support their assertions.

analyzing preemption cases and correctly determined, upon a detailed examination of the statutory language, legislative history, and statutory scheme as a whole, that § 114(c) of the Superfund Act, 42 *U.S.C.* § 9614(c), did not invalidate the tax levied by New Jersey to support the State's hazardous discharge prevention and cleanup program. Plenary review is also unnecessary here because the conflicts alleged by Exxon between the decision below and the precedents of this Court, and between the federal and state statutes in question, are imagined rather than real, as demonstrated below.

A. The Approach Used by the Supreme Court of New Jersey to Analyze the Preemption Issue in this Case is Completely Consistent With the Precedents of this Court.

The primary thrust of preemption analysis is to determine the intent of Congress in enacting the federal statute in issue. *Shaw v. Delta Air Lines, Inc.*, 103 *S.Ct.* 2890, 2899 (1983); *Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta*, 458 *U.S.* 141, 152 (1982). For until that intent is ascertained, it is impossible to decide whether the state enactment "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and thus must be invalidated under the Supremacy Clause. *Jones v. Rath Packing Co.*, 430 *U.S.* 519, 526 (1977), quoting *Hines v. Davidowitz*, 312 *U.S.* 52, 67 (1941). The Supreme Court of New Jersey recognized and gave effect to this key element of preemption doctrine in its opinion below which liberally cited and carefully followed the precedents of this Court. In an effort to support the granting of plenary review here, however, Exxon has alleged that the Supreme Court of New Jersey "disregarded" settled

preemption principles in upholding the Spill Fund tax. This allegation—based on an illusory conflict between the decision below and this Court's opinion in *Aloha Airlines v. Div. of Taxation of Hawaii*, 104 *S.Ct.* 291 (1983)—is a sheer makeweight, however, and thus cannot sustain Exxon's request for plenary review.

The *Aloha Airlines* opinion noted that courts need not look beyond the plain meaning of a statutory provision where preemption is alleged *if* the federal enactment in question clearly and unambiguously forbids a particular type of state action, and precisely that kind of action is under attack. 104 *S.Ct.* at 294. The key to this holding—and to the plain meaning rule in general—is that the federal statutory provision must be completely free from ambiguity on its face, and must operate independently of the rest of the statute. Even Exxon recognizes that these essential prerequisites must be met before the plain meaning rule can properly be invoked. (Jurisdictional Statement at 8).

After acknowledging these requirements, however, Exxon proceeds to ignore them. For § 114(c) automatically falls beyond the scope of the plain meaning rule because it is ambiguous on its face. First, the provision is not self-defining like the statutory section in issue in *Aloha Airlines*, but rather explicitly refers to the balance of the Superfund Act for a complete understanding of its terms. Moreover, § 114(c) does not categorically prevent the states from taxing industry to support all hazardous waste cleanup programs, as Exxon would have this Court believe, but only from taxing persons "to pay compensation for claims . . . which may be compensated under this subchapter." 42 *U.S.C.* § 9614(c). Resort to the rest of the

Superfund Act at the very least is consequently necessary to determine the extent of federal coverage and—derivatively—to determine the extent of federal preemption. Yet, Exxon has persistently refused to recognize this fact. Finally, application of the plain meaning rule would be inappropriate here in any event because the word "may" is used in § 114(c)—a word that has had many different meanings ascribed to it and thus is inherently ambiguous. *See generally Kraft v. Board of Educ. for D.C.*, 247 *F. Supp.* 21, 24-25 (D.D.C. 1965), *cert.* denied 386 *U.S.* 958 (1967); *Webster's Third New International Dictionary* at 1396 (1971); *Webster's New Collegiate Dictionary* at 711 (1976); *Black's Law Dictionary* at 883 (rev. 5th ed. 1979). Given these facial ambiguities in § 114(c), *Aloha Airlines* does not support the position advanced by Exxon. The alleged "conflict" between that decision and the opinion below must consequently be seen for what it really is: an attempt to create a conflict where none exists.

As is painfully obvious from an examination of the instant matter, Exxon argues so strenuously for application of the plain meaning rule because it wants to prevent the Court from considering the Bradley/Randolph colloquy that undermines Exxon's position in this litigation and supports the narrow reading of § 114(c) endorsed below. While Exxon's effort in this regard is understandable, it is not valid. For none of the cases cited by Exxon authorize courts to exclude pertinent legislative history from consideration. Indeed, even in *Aloha Airlines* the Court discussed the legislative history of the federal enactment and relied upon it to support a determination of congressional intent. 104 *S.Ct.* at 294-295. Similar reliance on relevant legislative history can be found in two

additional cases cited by Exxon as purported support for its misguided "plain meaning" argument: *Ernst & Ernst v. Hochfelder*, 425 *U.S.* 185 (1976); and *Arizona Public Serv. Co. v. Snead*, 441 *U.S.* 141 (1979).

When the Supreme Court of New Jersey relied upon contemporaneous legislative history that was directly pertinent to the preemption issue in question here, therefore, it adhered to the precedents established by this Court. Moreover, contrary to Exxon's assertions, use of the views of a subsequent Congress by the court below to confirm legislative intent was also appropriate. *See Bell v. New Jersey and Pennsylvania*, 461 *U.S.* 773 (1983); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 *U.S.* 572, 596 (1980). So, too, was reliance on a Superfund program guidance document addressing the preemption question issued by the United States Environmental Protection Agency. *See Youakim v. Miller*, 425 *U.S.* 231, 235-236 (1976). Since all of Exxon's objections to the approach utilized by the Supreme Court of New Jersey to analyze the preemption issue are without merit, plenary review to address these objections is completely unwarranted.

B. The Supreme Court Of New Jersey Correctly Concluded That The Preemption Clause Of The Superfund Act Is Narrow In Scope And Permits New Jersey To Continue Its Spill Fund Tax As Long As The Revenues Collected Are Dedicated To Financing Spill Fund Program Costs Not Covered Or Actually Compensated by Superfund.

Before sustaining the validity of the Spill Fund tax against Exxon's preemption challenge, the Supreme Court of New Jersey carefully analyzed the State and federal

enactments and determined that no irreconcilable conflict existed between the two regulatory schemes. It found ample support for the conclusion that the statutes could be harmonized in the language of § 114(c), in the Superfund Act as a whole, in the legislative history of the Act, and in the operation of the federal program by the United States Environmental Protection Agency. A review of each of these elements of the decision below will demonstrate that the Supreme Court of New Jersey properly upheld the Spill Fund tax, and that plenary review by this Court is consequently unnecessary.

Section 114(c), by its own terms, restricts state taxation only insofar as revenues are used for costs that "may be compensated under this subchapter." It is completely consonant with this language, therefore, for states to tax industry for activities excluded from coverage by Superfund. As a consequence, there is no preemption whatsoever of state taxation to finance state program costs that are not eligible for Superfund financing. For what Congress did in § 114(c) was to relate the restriction on state taxation to the areas it chose to cover on the federal level, leaving large untouched areas to be proper objects of state taxation and spending. When Congress circumscribes its coverage in this way, "state regulation outside that limited field . . . is not forbidden or displaced." *Kelly v. State of Washington*, 302 *U.S.* 1, 10 (1937). *See also Shaw v. Delta Air Lines, Inc., supra*, 103 *S.Ct.* at 2900 (state anti-discrimination employment law preempted only insofar as it related to pension plans covered by ERISA and thus continued to apply to other aspects of the employment relationship such as hiring, promotions, and salaries).

The New Jersey Spill Act provides financing for many categories of costs that are not eligible for federal Superfund compensation. These categories include the cost of remedying petroleum spills, the payment of third party property damage claims, the personnel and equipment expenses incurred by the Department of Environmental Protection in operating the State spill program, and the administrative costs of the Spill Fund. *N.J.S.A.* 58:10-23.11o; *compare* 42 *U.S.C.* § 9601 *et seq.* The State legislation also provides financing, as the courts below held, for cleanup costs at discharge sites of local but not national significance and thus beyond the scope of Superfund, and for the ten percent or greater state match at priority sites—a contribution that specifically cannot be paid by federal funds. 42 *U.S.C.* § 9604(c). In regard to the State match, the New Jersey Legislature explicitly recognized that the Spill Fund should be used for this purpose when it enacted the Hazardous Discharge Bond Act, *P.L.* 1981, *c.* 275, which provided that bond moneys could be used for the match if resources in the Spill Fund were insufficient. *Ibid.* at section 15. Since none of the above categories are covered by Superfund, it is clear that New Jersey may continue to tax industry for these purposes.

Exxon maintains to the contrary, however, that the only permissible state tax would be one dedicated solely to the exemptions authorized in the second sentence of § 114(c) (Jurisdictional Statement at 8). Such a reading would severely restrict a state's right to tax industry by requiring that all revenues derived from the tax be used "to finance the purchase or prepositioning of hazardous substance response equipment or other preparations for the response to a release of hazardous substances which

aff cts such State." 42 *U.S.C.* § 9614(c). Exxon's argument fails because it simply refuses to recognize the express language of § 114(c) which limits the preemptive scope of the provision to areas covered by the federal Act and leaves other areas open to regulation by the states. It also fails because the argument is contrary to the legislative intent. *See* 126 *Cong. Rec.* 30949 (1980) (remarks of Senators Randolph and Bradley); 126 *Cong. Rec.* 31965 (1980) (remarks of Representative Florio). The court below thus correctly concluded that § 114(c) did not preempt the Spill Fund tax as long as the revenues derived therefrom were used to compensate hazardous waste cleanup costs and claims not covered by Superfund.

While the areas of Spill Fund spending that fall beyond the scope of federal coverage would alone sustain the validity of the New Jersey tax, the Supreme Court of New Jersey also held that the State tax could be used to finance costs "not in fact compensated by Superfund moneys." 97 *N.J.* at 543 (Aa35). This conclusion was based on a pragmatic analysis of the federal and state programs that followed the directive of *Jones v. Rath Packing Co., supra,* 430 *U.S.* at 526, which required courts addressing preemption problems "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."

The key to determining the impact of § 114(c) on New Jersey's financing scheme for the Spill Fund program is to ascertain what activities may be paid for on the federal level under the provisions of the Superfund Act. Although this question is at the crux of the instant case, Exxon never addresses it, but rather assumes that the

Superfund Act makes compensation available for any and all hazardous waste cleanup actions and related expenses. Such an assumption ignores the limited coverage provided by the federal act and substitutes superficial, conclusory allegations for a close examination of the statutory and regulatory aspects of Superfund. When the Superfund program is analyzed carefully, however, it supports the holding reached by the court below and not the simplistic argument advanced by Exxon.

The Superfund Act provided that all response actions to releases of hazardous substances be consistent with the National Contingency Plan for the removal of oil and hazardous substances ("NCP"). 42 *U.S.C.* § 9604(a). The Act also directed that the existing NCP be revised to include criteria for determining priorities among problem sites throughout the United States. 42 *U.S.C.* § 9605 (8)(A). Based upon these criteria, the federal government must select—with input from the states—the worst sites in the country for inclusion on the National Priority List ("NPL"). 42 *U.S.C.* § 9605(8)(B). In order to qualify for federally financed remedial action, a release must be on the NPL. This requirement drastically restricts the number of sites where federal funding will even be considered. Superfund's focus upon the worst sites nationwide is consistent with the legislative history of the Act which recognized that the funding limitations of the federal program would make responses possible only at the most severely damaged sites. *See, e.g.,* S. Rep. No. 848, 96th Cong., 2d Sess. at 17; [1980] U.S. Code Cong. & Ad. News at 6139 (comments of Representative Gore); 126 *Cong. Rec.* 30940 (1980) (remarks of Senator Tsongas).

EPA, the federal agency charged with implementing the Superfund program, has elaborated on the Act's restricted coverage in the NCP. *See* 40 *C.F.R.* Part 300. That document specifically provides that remedial actions will be authorized only for releases on the NPL. 40 *C.F.R.* § 300.68(a). It is important to note, however, that inclusion on the NPL does not guarantee that compensation will be provided, but merely constitutes the first step toward qualifying for Superfund financed remedial action. As to the question of eligibility for funding, EPA has analyzed the NCP in the following manner:

> Subpart F establishes criteria upon which decisions as to eligibility for Federal funding will be based. The eligibility of particular actions will be decided on a case-by-case basis using these factors. The Plan cannot ensure funding approval for specific actions since current demands for response and expected future demands exceed available funds. [47 Fed. Reg. at 31195 to 31196 (July 16, 1982)]

See also Ibid. at 31187 where EPA noted that inclusion on the NPL did not guarantee eventual federal funding.

Since eligibility for Superfund financing is determined on a case by case basis, the only way to ascertain whether a particular site may receive compensation under the federal act is to make an application to EPA. If that site is not included on the NPL, or if included is rejected for financing, states should be permitted to use industry taxes to fund remedial action there because such work may not realistically be compensated by Superfund. Given EPA's case by case approach to eligibility, the "actual compensation" test endorsed by the Supreme Court of New Jersey is the only practicable way to interpret § 114(c).

Although Exxon argues that this narrow construction of § 114(c) renders the provision meaningless, this is not so. For what the actual compensation test requires of states that want to collect industry taxes is that they maximize their participation in the federal program by applying for compensation whenever a site has a reasonable chance to meet the criteria established in the NCP. A state could not ignore the federal program and then tax industry for any and all cleanup work in order to avoid federal entanglements and regulatory requirements, therefore, because such action would in essence lead to state taxation for work that could have been financed under Superfund—just the kind of double taxation and duplication of program goals proscribed by § 114(c). Should a state wish to pursue such a course, it would be required to fund an independent cleanup program through general revenues, as allowed by the second sentence of § 114(c). If a state chooses to use an industry tax to supplement federal cleanup efforts within its borders by financing remedial action where no Superfund compensation has been provided, however, this type of program is permissible under § 114(c).

While Exxon argues that the Supreme Court of New Jersey substituted its will for that of Congress when it endorsed the "actual compensation" test, this is not the case. For the test comes directly from the Bradley/Randolph colloquy quoted extensively above at pp. 6-7. There Senator Randolph stated unequivocally that § 114(c) would not preempt state taxation for activities eligible for federal financing, but where no Superfund reimbursement was actually provided. 126 *Cong. Rec.* 30949 (1980). Since Senator Randolph was a co-sponsor of the Superfund Act and Chairman of the Committee on Environment

and Public Works which referred the measure to the Senate, his remarks are entitled to great weight, as the Court below held. *Exxon v. Hunt,* 97 *N.J.* at 537 (Aa27), citing *F.E.A. v. Algonquin SNG, Inc.,* 426 *U.S.* 548, 564 (1976). Substantial deference should also be accorded to the Randolph comments because they were prompted by the situation in New Jersey and thus have a direct bearing on the issue raised in this case. Further congressional support for the "actual compensation" test can be found in a recent report of the House of Representatives Committee on Energy and Commerce which stated in regard to the Superfund Act that, "The Committee believes that the proper interpretation of current law is that its preemption provision was intended only to preclude states from imposing taxes or otherwise requiring contributions to funds which would pay costs or damages that would be actually compensated by Superfund." H.R. Rep. No. 890, Part 1, 98th Cong., 2d Sess. 58-59 (1984). While the views of a subsequent Congress are not always determinative of earlier legislative intent, they are persuasive here because they confirm the interpretation of § 114(c) contained in the Bradley/Randolph colloquy. Also of note is that the Committee explicitly rejected the broad preemption interpretation of § 114(c) advocated by Exxon. *Ibid.*

The "actual compensation" test has also been endorsed by EPA, the federal agency charged with implementing the Superfund Act. In a guidance document concerning the state role in the Superfund implementation process, EPA addressed the preemption issue and concluded that § 114(c) did not apply to state funds used "to compensate damage claims and to remove or remedy releases of hazardous substances eligible to be financed by

the Fund but for which no federal reimbursement is provided." *Office of Emergency and Remedial Response, U.S. Environmental Protection Agency, Guidance: Cooperative Agreements and Contracts with States Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980,* at p. x (March 1982). By following the interpretation of § 114(c) endorsed by both Congress and EPA, the Supreme Court of New Jersey did not engraft its own policy judgments upon the Superfund statute as Exxon contends, but rather gave full effect to the will of Congress and the views of EPA. Exxon's criticism of the opinion below is thus lacking in substance and does not merit plenary review by this Court.

As is abundantly clear from the decision of the Supreme Court of New Jersey and from the above analysis supporting the conclusions reached below, the State Spill Fund tax and the federal Superfund law can coexist without offending congressional objectives. Where such harmony is possible, the state statute must be upheld. *Florida Lime & Avocado Growers v. Paul, supra,* 373 *U.S.* at 141-143. Hypothetical or illusory conflicts such as those posited by Exxon simply are not sufficient to support a finding of preemption; actual conflict between the state and federal legislation must be demonstrated. *Rice v. Norman Williams Co.,* 458 *U.S.* 654 (1982); *Goldstein v. California,* 412 *U.S.* 546 (1973). Given the absence of any real conflict in this case, the decision upholding the State enactment should be affirmed, or the appeal filed by Exxon dismissed for lack of a substantial federal question.

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CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed or the judgment of the Supreme Court of New Jersey affirmed.

Respectfully submitted,

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